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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 705

DONALD PETER VAN HOOK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES.

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner believes that this Reply Brief[1] to the Memorandum of the United States under Rule 24 (4) is going

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[1] For the purpose of clarity we shall,—as in the original Petition,—refer to the Appendix filed before the United States Court of Appeals for the Seventh Circuit as (App. page .....). Appendix A is the Opinion of the United States Court of Appeals for the Seventh Circuit attached to the original Petition. Appendix B, the pertinent Statutes and Regulations appear as pages 13a to 16a of the original Petition. Appendix C is the Exhibit volume submitted to the United States Court of Appeals for the Seventh Circuit and certified to this Court. Appendix D is found on pages 1a to 4a of Appellant's Petition for Rehearing filed before the United States Court of Appeals for the Seventh Circuit and certified to this Court.

to be helpful to the Court because; Firstly, there are certain factual as well as legal errors in the Memorandum; Secondly, because a pertinent case was reported after the Petition was filed herein, and Thirdly, because the conclusion and recommendation of the Memorandum for the United States, that *Green* v. *United States,* No. 70, decided by this Court on February 27, 1961, suggests nothing more but that the cause be remanded to the District Court for resentencing is clearly contrary to law.

ARGUMENT.

On pages 4 and 5 of the Memorandum a reference is made to the investigation of Petitioner's case and the recommendation made by the Department of Justice to the State Appeal Board. Petitioner submits that it is of significance to point out that such recommendation (App. C. Government Exhibit B-55) is dated November 16, 1956, and it is further significant that reference is made therein to a former recommendation by the Department of Justice "on the date of March 25, 1953" (page 2 of Exhibit B-55) from which it is quoted "the Church of which registrant is a member and upon whose teachings he bases his claim is engaged in the production of defense products under government contract." In 1953, the Department of Justice used this as the basis from which to conclude that Petitioner failed to sustain his claim with respect to non-combatant service. The Memorandum fails to point out, and thus makes an error of omission, that the Department of Justice report of 1956 (Exhibit B-55, page 3) further says that petitioner "impressed the Hearing Officers with his frank and truthful attitude. The Hearing Officer found that the registrant is a sincere and conscientious member of his denomination and that by reason of his religious training and beliefs conscientiously opposed to combatant military training and service in the armed forces. The Hearing Officer found, however, *the distinction that registrant attempts to draw between noncombatant participation in war as a civilian and similar noncombatant participation as a member of the armed forces was too tenuous for recognition . . .*" (emphasis ours)

The Memorandum failed to point out that the resumé of inquiry attached to the Department of Justice's recommendation of 1956 (App. C Exhibit B-57) points out that

> "Neighbors and associates unanimously advise that registrant is of good character, habits and reputation; that he is regular in his attendance at church services and he is generally honest and sincere . . . never heard of the registrant participating or acting in any manner which would be in contradiction to the beliefs of the church . . . always conducted himself according to the teachings of the church. Interviewees unanimously stated that registrant has never been in trouble and that they had no reason to doubt the sincerity of his claim. . . . Registrant and his family . . . are individuals whose reputation and sincerity regarding their beliefs are above reproach . . . would recommend him as to his sincerity in his conscientious-objector claim. The pastor of the Church . . . defended her church's position by what she called the Law of Love and she added that the people of her congregation would not protect their property if it meant injury to others."

The Memorandum errs further, by ommission and, by its failure o consider Petitioner's anwser to the recommendation of the Department of Justice (App. C, Def's. Exhibit 18). It particularly errs when it fails to consider Petitioner's answer to the effect that contrary to the Department of Justice's conclusions, *the Church of Jesus Christ is not engaged in any industry nor is it producing anything under government contract;* that Community Industries involved is a legal entity of its own which is operated by members of the church but not by the church itself.

The Memorandum fails to take into consideration Petitioner's answer to the Department of Justice's recom-

mendation where it states "*my conscience is on trial not Community Industries.*"

The Memorandum failed to consider Petitioner's claim to exemption both combatant and noncombatant service, because of his religious training and belief as it is set forth in defendant's exhibit 18. (App. C, page 33).

The Memorandum for the United States (page 4) emphasizes that the Board which classified Petitioner in 1955 "was then composed of different members from those who had previously classified Petitioner" and further emphasized that he was given a "new" classification. The Memorandum fails to point out that this "new" classification was exactly the same that was given to him by the prior Board, that is 1-A-O, exempting him from combatant service only. The Memorandum erred when it failed to point out, as it so clearly appears from Government exhibit B-50 (App. C, pages 21-23)—that this "new Board" did "recognize his sincerity in his belief and his church". The Memorandum failed to point out that before the new Board reclassified Petitioner exactly as he was classified before, the members "prayed to God for understanding and guidance in the classification thereof. We truly believe that we have been guided and we took a secret ballot. The ballot was a unanimous vote of all Board members leading to the *classification of 1-A-O for all conscientious-objectors of Moultrie County.* We do not have a registrant classified 1-o in our files today." (emphasis ours)

The Memorandum for the Government erroneously argues against Petitioner's objection to the introduction of the letter of Captain W. H. Schuttler (page 6 and 7). It argues erroneously because the thrust of Petitioner's argument was that this letter does not and ought not to take the place of proof of *corpus delicti*, notwith-

standing 28 U.S.C. 1733, and notwithstanding Army Regulation 601-270 or 615-180-1. Petitioner's argument was that the admission of this letter in absence of the writer thereof deprived him of the right of cross-examination; that it expressed nothing but an opinion to the effect that the beliefs of Petitioner's church "will not permit him to be inducted." The objection goes to the fact that nowhere in Captain Schuttler's letter is there a description of an "occurrence" to the effect that Petitioner *after* being ordered to do so failed to take the step forward which is, under the regulations, the symbol of induction into the armed forces. The objection goes to the obvious fact that the letter never even mentions that anyone present at the scene described by Captain Schuttler ever ordered him to take the step forward. (App. C, page 31, Government's exhibit B-74).[2]

Petitioner's objection to the admission of Captain Schuttler's letter went further, on the ground that it was a document that was obviously written for the purpose of prosecution and that in consequence, the hearsay rule is not relaxed notwithstanding 28 U.S.C. 1733 (see footnote 2 supra).

The Memorandum for the United States on pages 7 to 10 states that since the Appeal Board acts *de novo* and in consequence "whether the local Board applied proper standards is, therefore, immaterial . . ." In support of this contention various cases are cited. How-

[2] The Court's attention is called to a well reasoned article entitled, "Official Records and Business Entries" by Donald E. Selby, appearing in the Military Law Review, Department of the Army Pamphlet 27-100-11, January, 1961, pages 41, et ff., in which it is shown that the Federal Courts are not in agreement, but to the contrary, leave the matter in a confused state as to the interpretation of 28 U.S.C. 1733.

ever, Petitioner restates his argument set forth in his original Petition that there are cases to the contrary and that therefore, this Court ought to grant a writ of certiorari so that this issue may be resolved.

The United States Court of Appeals for the Ninth Circuit in the case of *Joe Ronald Kretchet* v. *United States*, (decided on December 1, 1960, and published on February 13, 1961), 284 F2d 561, considers the self-same issue and reaches a conclusion contrary to the cases cited by the Memorandum of the United States on pages 7 and 8. In that case the Ninth Circuit Court of Appeals said on page 565:

> "We are unable to determine from the record whether the board, in refusing to sustain appellant's claim for exemption, did so because of appellant's lack of sincerity, or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds, or on two of them. The advice given by the Department of Justice to the Appeal Board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice."

Petitioner submits that as in the *Kretchet* case, so here the advice of the Department of Justice was clearly erroneous and "fatally infected the adverse recommendation."

The Memorandum for the United States is clearly in error when it states on page 8 that there was a factual basis for the denial of Petitioner's claim as objecting to all military services because "Government exhibits B-10

and B-55, which were in the Petitioner's selective service file indicated that he had worked for a number of years for 'Community Industries', a 'factory' run by the Harshmanite Church, which manufactured under Government contract various items used by the armed forces (*i.e.*, candy for army rations, tents, Wac uniforms, and naval compressors)". The Memorandum is in error because *the Community Industries is not a factory run by the Harshmanite Church* but as the record, and particularly Government exhibit B-10 (App. C) clearly discloses this factory was established by some people, who are members of the Harshmanite Church, so that church members and others may have employment when their community, during World War I, refused to employ members of this church because they were opposed to war. The Memorandum is further in error because this factory did not manufacure "candy for army rations" but simply manufactured candy, some of which may have been purchased and put into army rations. The Memorandum is in error because the exhibits mentioned show that this factory manufactured nurse's uniforms, though it is possible that when the Government purchased such uniforms it may have assigned them to Wacs, Waves or to Lady Marines. The Memorandum is, we submit, maliciously erroneous when it claims that this factory manufactured "naval compressors". The only reference we could find even approximating the device referred to, appears in the Department of Justice's recommendation of November 16, 1956, (Government exhibit B-55, App. C, page 3). There the assistant Attorney General describes the setup of the Community Industries as composed of three divisions "consisting of the candy factory, a division dedicated to the manufacture of dresses, uniforms, tents and other cloth items, and the metal fabricating division known as George Garden Tractor divi-

sion. Items manufactured for the armed forces have included tents, Wac uniforms and some sort of pump or compressor used on naval vessels, and other items."

While Petitioner submits that under the present economic setup there is no employment (not even that of the minister of the gospel) which had not been used for military purposes, however, to make out of "some sort of pump or compressor used on naval vessels" a "naval compressor" is a malicious misstatement of the facts, and is just as much justified as if the Memorandum would have suggested that the Community Industries are equipping the Polaris submarines or the Missile Base in Florida where, for all we know, "some sort of pump or compressor" is also being used.

The Memorandum is in error because the cases cited by it on pages 8 and 9 are in conflict with cases decided by other Circuits, as cited by our original Brief, and particularly is in conflict with the decision of the United States Court of Appeals for the Seventh Circuit, *United States* v. *Wilson,* 215 F2d 443 as well as the decision of this Court in *Estep* v. *United States,* 327 U.S. 114, 66 S.Ct. 423 and other cases cited.

On page 10 the Memorandum for the United States again makes the error of claiming that the church to which Petitioner belongs "operated a factory which engaged in defense production work". Petitioner restates that his church operated no factory whatsoever, and furthermore that *it is his conscience and not that of the church that was, or ought* to have been, before the Draft Board, the Appeal Board, the Department of Justice, and the Courts.

The Memorandum for the United States is further in error when it argues that the trial Court's calling "for

the 'Appeal Board's letter' ", took the place of the Court's searching the record for factual basis of the classification. Petitioner submits that the Appeal Board's letter (App. C, Government's exhibit B-59, page 30) had no place in the record because it was obviously prepared for the purpose of the prosecution and for the purpose of supplying, if it can, the missing factual basis for the classification, and that his timely objections should have been sustained thereto. (footnote 2 *supra*)

On page 10, the Memorandum of the Government states that this Petitioner on pages 20-21 of his original Petition contends that "the instructions from the Appeal Board on May 10, 1955, to the local Board to reprocess the Petitioner's case were disregarded by the local Board. . . ." Petitioner did not, and could not have referred to the instruction of the Appeal Board on May 10, 1955, because such instructions came not from the Appeal Board but from the Illinois Selective Service Director's Office.

The Memorandum forwards a contention which is an error in law, when it claims "that the proceedings before the local board are immaterial in the present posture of the case since Petitioner's classification was given him following *de novo* consideration and classification by the Appeal Board" (page 10 and 11). Petitioner contends that this interpretation is erroneous as a matter of law on the basis of *Mintz* v. *Howlett*, 207 F.2d 758, 762 and cases therein cited. See also, *Nugent* v. *United States*, 346 U.S. 1, 73 S. Ct. 991.

Petitioner further submits that because of the conflict in the various circuits, this Court ought to clarify the issues by granting a writ of certiorari and upon hearing the case, give its decision.

The Memorandum for the United States confesses that "there was no compliance at all" with Rule 32(a), F.R.

Crim. P." and it suggested that "in view of this Court's ruling in *Green* v. *United States*, No. 70, decided February 27, 1961, Petitioner should be resentenced."[3] The respondent also suggested that "Petition for writ of certiorari should be granted and the cause remanded to the District Court for resentencing."

While Petitioner believes that the rules should apply in all cases, nevertheless, he respectfully distinguishes his case involving his religious training and beliefs from that of *Green* in the above cited case. Green was convicted for 1) entering a bank with intent to commit a felony, 2) robbing the bank and 3) assaulting or putting in jeopardy the lives of persons by use of a dangerous weapon while committing the robbery. Green's indictment and conviction occurred in 1952, and he filed case No. 70 before this Court based solely on his claim of violation of Rule 32(a) F.R. Crim. P. Petitioner here contended that the "DRAFT BOARD's ORDER ISSUED IN DISREGARD OF REGULATIONS IS VOID" (Petition Pgs. 20-21) He contended a lack of due process, therefore. That "THE DRAFT BOARD'S ACTION IS NOT CURED BY THE SO-CALLED DE NOVO ACT OF THE APPEAL BOARD" (Petition pages 21 to 23). He also contended that (Petition, pages 23 to 26) "A SELF SERVING STATEMENT BY THE ILLINOIS APPEAL BOARD GIVING NO REASONS OR EXPLANATIONS CANNOT AND DOES NOT TAKE THE PLACE OF BASIS IN FACT THAT IS REQUIRED BY THE HOLDING OF THIS COURT". Petitioner contended that (Pet. pages 26-27) "THE FAILURE AND THE REFUSAL OF THE TRIAL JUDGE TO SEARCH THE RECORD FOR BASIS IN FACT IS A COMPELLING REASON TO GRANT A WRIT OF CERTIORARI" and he also contended that (No. 506, Pet. pgs. 27 and 28)

[3] 81 S. Ct. 653.

"THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN ITS OPINION, POINTED TO NO BASIS IN FACT FOR THE DRAFT BOARD OR APPEAL BOARD'S ACTION, AND THEREFORE THERE IS A CONFLICT WITH OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT", and last but not least, he contended that lack of due process requires the granting of a writ of certiorari and only as an addition to the above weighty, statutory and constitutional issues did he claim the violation of 32(a) F.R. Crim. P. (Pet. pgs. 29 and 30).

Petitioner submits that the granting of the writ of certiorari narrowly limited as suggested by the Memorandum for the United States, will leave all the issues raised by the original Petition unanswered. Petitioner believes that the rules and the law pertaining to due process requires that a full hearing be held upon the granting of an unlimited writ of certiorari, since the violation of the due process is just as compelling as is the violation of 32(a) F.R. Crim. P. in compelling of a partial grant, by the admission of the Memorandum for the United States.

CONCLUSION.

Petitioner submits that there are weighty, statutory and constitutional issues involved in his case and that therefore, the writ of certiorari ought to be granted.

Respectfully submitted,

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